Supreme Court, U.S.
FILED
SEP 14 1992
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No. 92-41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ARBY'S, INC. and FRED BARTLIFF,
Petitioners,

v.

KITCHENS FOODS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONERS' REPLY BRIEF

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September 14, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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PETITIONERS' REPLY BRIEF

INTRODUCTION AND SUMMARY

The Petition establishes that, whether accomplished by legislative act or judicial fiat, the retroactive imposition of punitive damages for conduct that was not actionable at the time it occurred violates the Due Process Clause and its inherent concepts of notice and fundamental fairness. Respondents do not refute or even question this fundamental principle of due process. Instead, they assert that liability here was not premised on a post-conduct change in Alabama fraud law. However, an examination of the "century of Alabama case law" cited by Respondents confirms that, as demonstrated in the Petition, statements of opinion were not actionable as fraud under Alabama law in 1985. Similarly, the record does not support Respondents' various attempts to establish an alternative basis for the $1.5 million punitive damage award. Thus, this case squarely presents an issue that has divided lower courts: whether the retroactive imposition of punitive damages violates due process.

Respondents' contention that this due process issue was not preserved also is contradicted by the record. Petitioners directly raised a due process challenge to the imposition of punitive damages before the District Court. Similarly, once the factual and legal predicate for the retroactivity argument—*i.e.*, the change in Alabama fraud law—occurred, Petitioners briefed and argued this precise issue before the Court of Appeals.

Respondents also do not dispute the basic principle that due process mandates post-verdict review of the reasonableness of punitive damage awards. Instead, in an attempt to condition this due process right on procedural requirements that have not been recognized by this Court, Respondents apparently assert that Petitioners were under an obligation to file a separate post-trial motion directed exclusively to the excessiveness of the punitive damage award and to present additional evidence on the issue. Respondents' attempts to impose previously unrecognized

procedural requirements contravene the explicit mandates of this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), and ignore the status of the law at the time this case was before the District Court and the Court of Appeals. Thus, at a minimum, the Court should remand this action to the District Court for reconsideration in light of the post-verdict review procedures mandated by *Haslip*.

ARGUMENT

A. Retroactivity

1. *Statements Of Opinion Were Not Actionable In Alabama In 1985.*

In an attempt to rebut the factual premise underlying Petitioners' due process challenge, Respondents cite a litany of Alabama Supreme Court decisions dating back to the late 1800's purporting to establish that false statements of opinion were actionable in 1985. Opposition, at 12-15. However, Respondents' case law does not include a single decision involving an actionable opinion as to future events (in contrast to a promise of future action—*i.e.*, promissory fraud). In fact, in many of the cases cited by Respondents in support of their purported "long-standing exception," recovery was denied. *See Bradfield v. Elyton Land Co.*, 8 So. 383 (Ala. 1890); *Griel v. Lomax*, 6 So. 741 (Ala. 1889); *Montgomery Southern Railway Co. v. Matthews*, 77 Ala. 357 (1884). Indeed, in the case principally relied upon by Respondents, *Montgomery Southern*, the Court held that the alleged representations of opinion regarding the construction of a railroad line were not actionable. 77 Ala., at 366.

A number of the other decisions cited by Respondents involve promissory fraud. *See Randell v. Banzhoff*, 375 So. 2d 445 (Ala. 1979) (representation by franchisor that it would locate purchaser for franchise), *cert. denied*, 444 U.S. 1081 (1980); *Scholz Homes, Inc. v. Hooper*, 254 So. 2d 328 (Ala. 1971) (representation by contractor that cost of construction of home would not exceed specified amount). Promissory fraud is a separate cause of

action "based upon a promise to perform or abstain from performing some act in the future." *P&S Bus., Inc. v. South Cent. Bell Tel. Co.*, 466 So. 2d 928, 930 (Ala. 1985). Until the Alabama Supreme Court's 1990 decision in *Reynolds*, promissory fraud had long been recognized as the sole exception to the rule that a fraud claim must be based on a statement of existing fact. *See, e.g., P&S Bus.*, 466 So. 2d, at 930. However, Respondents here did not plead—and certainly did not prove—a claim for promissory fraud.

The remainder of the Alabama Supreme Court decisions cited by Respondents involve representations of existing fact. For instance, in *Shepherd v. Kendrick*, 181 So. 782, 784 (Ala. 1938), the representation at issue related to an existing fact: the permanence of streams represented to have been "never dry." [1] Moreover, Respondents' characterization of *Shepherd* has been repudiated by the Alabama Supreme Court itself, which has cited *Shepherd* in support of the traditional existing fact requirement:

> We have ruled consistently that an actionable misrepresentation must be of present fact. *See, e.g., Scholz Homes, Inc. v. Hooper*, 287 Ala. 628, 254 So. 2d 328 (1971), *Birmingham Broadcasting Co. v. Bell*, 259 Ala. 656, 68 So. 2d 314 (1953); *Shepherd v. Kendrick*, 236 Ala. 289, 181 So. 782 (1938) . . . . Plaintiffs cannot recover . . . because they failed to prove misrepresentation of an existing material fact.

Sly v. First Nat'l Bank, 387 So. 2d 198, 200 (Ala. 1980).

An examination of the cases cited in the Opposition reveals that the "longstanding exception" asserted by

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[1] *See also Ringer v. First Nat'l Bank*, 281 So. 2d 261 (Ala. 1973) (representation by bank that payments had been made under assumption agreement and that purchasers were more qualified than other proposed purchasers); *Stephens v. Hill*, 31 So. 2d 136 (Ala. 1947) (representation of value and quantity of lumber on land); *Tillis v. Smith Sons Lumber Co.*, 65 So. 1015 (Ala. 1914) (representation that bonds and preferred stock "were as good as gold" and "were secured by a first mortgage on all the property" of the railroad company).

Respondents has no support in the law. Rather, as shown in the Petition,[2] opinions as to future events were not actionable in Alabama in 1985. *See, e.g., Jones v. McGuffin*, 454 So. 2d 509, 512 (Ala. 1984) ("It is axiomatic that mere statements of opinion are not material facts upon which actions for legal fraud can be maintained").

2. *The Retroactivity Argument Was Preserved Below.*

Respondents also argue that Petitioners did not preserve their retroactivity challenge to the imposition of punitive damages. *See* Opposition, at 7-10. However, Petitioners could not assert a retroactivity challenge based on a change in the law before that change in the law occurred. At the time of trial, the Alabama Supreme Court's most recent holding was that "[f]raud cannot be based on opinion." *Keller v. Security Fed. Sav. & Loan Ass'n*, 555 So. 2d 151, 155 (Ala. 1989). This holding, which was not *dictum* or the mere rote statement of a general rule, as Respondents suggest, was entirely consistent with longstanding Alabama precedent. *See, e.g., Jones*, 454 So. 2d, at 512. Thus, when the present case was before the District Court, it appeared that (1) Petitioners were entitled to judgment on Respondents' fraud claims because those claims were based on statements that, at best, were opinions; and (2) there was no proper basis for arguing that Alabama law with respect to the fact/opinion distinction had changed since the conduct at issue occurred, because the law both at the time of the conduct (1985) and at the time of trial (1990) was that fraud could not be based on opinion.

Respondents argue that a retroactivity challenge should have been raised before the District Court in light of the Alabama Supreme Court's decision in *Reynolds v. Mitchell*, 529 So. 2d 227 (Ala. 1988). *See* Opposition, at 8-9. However, at the time of the trial and the post-trial motions, *Reynolds* could not reasonably have been understood as a change in Alabama fraud law. The *Reynolds*

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[2] Petition, at 7-8.

Court did not give any indication that it intended to overrule the longstanding rule concerning opinion representations. Moreover, the cases cited in the pertinent passage of *Reynolds* appeared to confirm that the Court was not changing its rule. *See* 529 So. 2d, at 231. The first of these cases dealt with a misrepresentation of existing fact; the other three cases cited all were promissory fraud cases in which recovery ultimately was denied.

Thus, at the time, *Reynolds* appeared to be either an aberration decided on its particular facts or a case analyzed by the Court as promissory fraud. This view of *Reynolds* was confirmed a year later, when the Alabama Supreme Court expressly and without qualification held that "[f]raud cannot be based on opinion." *Keller v. Security Fed. Sav. & Loan Ass'n*, 555 So. 2d 151, 155 (Ala. 1989). *Keller* was not the only post-*Reynolds* case that confirmed this rule. *See Cornelius v. Austin*, 542 So. 2d 1220, 1223 (Ala. 1989) ("the defendants' statements constitute an expression of opinion, not a misrepresentation of fact").

The Alabama Supreme Court's decisions thus demonstrate that the change of law that is the predicate of Petitioners' retroactivity argument did not become apparent until later, particularly with the subsequent decision in *Reynolds*. *See Fraser v. Reynolds*, 588 So. 2d 442 (Ala. 1990), *subsequent appeal*, 588 So. 2d 448 (Ala. 1991); *see also Rodopoulos v. Sam Piki Enters., Inc.*, 570 So. 2d 661 (Ala. 1990). Accordingly, the retroactivity argument is properly before the Court for consideration because Petitioners raised the argument before the Court of Appeals—the first opportunity after the basis for the argument arose.

3. *The Award Of Punitive Damages Is Supported Exclusively By The Alleged Representations Of Opinion.*

Respondents also assert that there was some "independent basis" for the award of punitive damages. Opposition, at 16-17. However, the record demonstrates that the

award can be supported, if at all, only by the alleged representations of opinion.

In a bald attempt to recreate the record below, Respondents argue that they "pursued (and proved)" a claim for a misrepresentation of existing fact concerning average sales at Arby's restaurants. Opposition, at 17. This contention is patently false. The alleged misrepresentation of existing fact now proffered by Respondents to support the verdict was never at issue at trial. It (1) was not identified in the Complaint, which specifically delineated the claimed misrepresentations; (2) was not included in the Pre-Trial Statement; (3) was not raised in Respondents' Pre-Trial Brief; (4) was not described by any witness during Respondents' case-in-chief; and (5) was never argued to the jury as a basis for a finding of fraud. Indeed, the first time that this alleged representation was cited as a basis to support the verdict was in Respondents' Brief in Opposition to the Motion for Judgment Notwithstanding the Verdict. Respondents cannot now rely on this alleged misrepresentation, which was not at issue, to support a punitive damage award that is otherwise improper on the issues tried.

Respondents also argue that the fraudulent suppression claim provides an independent basis for the award of punitive damages. Opposition, at 16. Although they did not set out the grounds for their respective decisions, neither court below could have affirmed the verdict on this basis. At trial, the only information that Respondents claimed was "suppressed" was average sales at Arby's restaurants. Respondents admitted that they received an Offering Circular from Arby's in May 1985 that advised Respondents in writing that average sales figures would not be provided. (App. at 17a-19a). Petitioners are aware of no cases—and Respondents have cited none—that suggest that fraudulent suppression may be found where there was an explicit contemporaneous statement that the "suppressed" information would not be provided. In any event, Respondents' suppression claim, filed in July 1988, necessarily was time-barred under the two

year statute of limitations because Respondents were aware of the "suppression" in May 1985, when they were told the information would not be provided.

Accordingly, neither the supposed claim based on a representation of existing fact nor the "suppression" claim can provide an independent basis for the award of punitive damages.

B. Post-Verdict Review

Respondents suggest that Petitioners somehow waived any due process objection to the adequacy of post-verdict review of the award. Opposition, at 20-24. Respondents' argument ignores the fact that Petitioners consistently and specifically asserted a due process challenge to the imposition of punitive damages before both the District Court and the Court of Appeals. Petitioners explicitly challenged on due process grounds the excessiveness of the punitive damage award and the trial procedures used to assess punitive damages in their Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial.[3] Likewise, before the Court of Appeals, Petitioners maintained their due process challenge to the award of punitive damages.[4] Thus, the issue of whether the award of punitive damages comports with due process consistently has been at issue in the courts below. In any event, for the reasons set forth in the Petition, post-

[3] Petitioners argued in their Brief in support of this Motion that "[t]he excessiveness of this award, as well as the fact that under the law there was no limit on the jury's discretion to make such an award, demonstrates that the system under which the award was made does not comply with due process."

[4] Petitioners raised a due process challenge to the retroactive imposition of punitive damages before the Court of Appeals and in their Petition before this Court. The additional issue raised in the Petition—post-verdict review—is but a "mere enlargement" of these due process challenges. *See Illinois v. Gates*, 462 U.S. 213, 248 (1983) (White, J., concurring). Unlike the cases cited by Respondents, Petitioners' due process objections were not "vague appeal[s] to constitutional principles," *Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988), or mere "generic reference[s]" to the Due Process Clause, *Taylor v. Illinois*, 484 U.S. 400, 407 n.9 (1988).

verdict review pursuant to the procedural scheme mandated by *Haslip* is not conditioned on any specific request or demand by a defendant. *See* Petition, at 13-14.

In support of their waiver argument, Respondents note that Petitioners did not file a separate motion for a remittitur seeking a reduction of the punitive damage award. Opposition, at 20. Respondents' objection highlights the split in the Circuits regarding the procedures available to federal district courts in conducting post-verdict review. In the Fourth Circuit's view, the only remedy available to a federal district court in the face of an excessive punitive damage award is a new trial. *See Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 99 (4th Cir. 1991). *But see Cole v. Control Data Corp.*, 947 F.2d 313, 320 (8th Cir. 1991) (remanding for application of "appropriate principles of Missouri law"). Thus, under the Fourth Circuit rule, the Motion for a New Trial that was filed by Petitioners was the only procedural mechanism available to challenge the excessiveness of the punitive damage award.

At a minimum, it is clear that Petitioners are entitled to a remand to the District Court. At the time of the trial and the post-trial motions, *Haslip* had not yet been decided and there was no existing "federal right" to post-verdict review of punitive damage awards. Based in part on this Court granting certiorari, vacating the judgments, and remanding twelve cases in connection with its decision in *Haslip*,[5] the Eighth Circuit has recognized that cases pending in the federal courts at the time *Haslip* was

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[5] *See, e.g., Clayton Brokerage Co. v. Jordan*, 111 S. Ct. 1298 (1991); *Reserve Life Ins. Co. v. Eichenseer*, 111 S. Ct. 1298 (1991); *Hospital Auth. v. Jones*, 111 S. Ct. 1298 (1991). *These remands were afforded regardless of whether a precise Haslip-type due process challenge was raised in the Petition. See, e.g., Portec, Inc. v. Post Office*, No. 90-827, Petition for Writ of Certiorari (filed Nov. 26, 1990) (seeking review of "[w]hether the Colorado punitive damages statute which was applicable to this case is unconstitutional in violation of the due process clause of the United States Constitution"); *Clayton Brokerage Co. v. Jordan*, No. 88-1483, Petition for Writ of Certiorari (filed Mar. 8, 1989).

decided are entitled to a remand for reconsideration in light of the new due process standards. *See Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991) (case pending when *Haslip* was decided; court remanded for reconsideration under *Haslip*); *Cole v. Control Data Corp.*, 947 F.2d 313 (8th Cir. 1991) (same); *Doe v. B.P.S. Guard Servs., Inc.*, 945 F.2d 1422 (8th Cir. 1991) (same). Therefore, consistent with the procedures adopted by this Court and the Eighth Circuit, this case should be remanded to the District Court for reconsideration under the due process standards enunciated in *Haslip*.

Respondents also argue that Petitioners were obligated to present additional evidence supporting the excessiveness of the punitive damage award at a post-trial hearing. Opposition, at 24-27. The Alabama decisions cited by Respondents on this point are inapposite. *See* Opposition, at 26-27. In each of these cases, the court afforded the defendant the post-verdict review required by the Alabama Supreme Court in *Hammond v. City of Gladsen*, 493 So. 2d 1374 (Ala. 1986), but the defendant chose not to present evidence during the course of that review. *See, e.g., Associates Fin. Servs. Co. v. Barbour*, 592 So. 2d 191, 198 (Ala. 1991) (defendant "consciously elected" not to present evidence concerning the factors identified in *Hammond* during the post-verdict review hearing). These cases do not address the situation where, as here, the defendant was not afforded post-verdict review in the first instance.[6]

Thus, Respondents have failed to establish any procedural bar to Petitioners' right to post-verdict review of the punitive damage award. The Court should grant

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[6] In any event, as discussed above, *Haslip* had not yet been decided at the time this case was before the District Court and there was no recognized "federal right" to post-verdict review of punitive damages awards. Therefore, Petitioners were not obligated to present evidence supporting the excessiveness of the punitive damage award.

certiorari to resolve the substantive issues raised in the Petition and to clarify the dramatic split in the Circuits regarding the substantive standards and procedures applicable to post-verdict review by federal courts. However, even if the Court declines to undertake plenary review of the issues raised in the Petition, this case should be remanded to the District Court for a hearing in accordance with the procedures set forth in *Haslip*.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant their Petition for a Writ of Certiorari.

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